

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 17, 2014

v

JOSEPH THOMAS REINER,

Defendant-Appellant.

No. 313854
Macomb Circuit Court
LC No. 2012-000546-FC

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant, Joseph Thomas Reiner, was convicted of assault with intent to murder, MCL 750.83; first-degree home invasion, MCL 750.110a(2); and felony murder, MCL 750.316(1)(b). The trial court sentenced defendant to concurrent prison terms of 450 to 720 months for the assault with intent to murder conviction, 150 to 240 months for the home invasion conviction, and life imprisonment for the murder conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the February 23, 2011, home invasion of 49199 Fairchild Road in Macomb County, where 69-year-old Joanne Eisenhardt lived. A man, who was later identified as defendant, stabbed Eisenhardt in the neck with two knives. The knives were still in Eisenhardt's neck when police and emergency medical services arrived at the house. The surgeon who operated on Eisenhardt to remove the knives was "flabbergasted" that no major organs were injured. However, Eisenhardt suffered declining health after the incident and died seven months later.

I. EFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to call an independent forensic pathologist to dispute the testimony of Dr. Daniel Spitz, the chief medical examiner for Macomb County, that the manner of Eisenhardt's death was homicide. Because no *Ginther*¹ hearing has been held on defendant's

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

claim, our review is limited to errors apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call a witness only constitutes ineffective assistance of counsel if it deprived the defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). A substantial defense is one that might have made a difference in the outcome of trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Here, there is nothing in the record to indicate that trial counsel did not consult with an independent forensic pathologist. Defendant, therefore, has failed to overcome the presumption that counsel's performance in not calling an independent forensic pathologist was sound trial strategy. *Trakhtenberg*, 493 Mich at 52. Moreover, defendant has not shown that trial counsel's performance in not calling an independent forensic pathologist deprived him of a substantial defense. *Russell*, 297 Mich App at 716. There is nothing in the record to indicate that an independent forensic pathologist would have testified in defendant's favor, i.e., would have testified, in contradiction of Spitz, that Eisenhardt's death was not the natural and probable consequence of the home invasion and assault. See *People v Clark*, 171 Mich App 656, 659; 431 NW2d 88 (1988). Accordingly, defendant has not shown that, but for defense counsel's alleged deficient performance, there is a reasonable probability that the result of his trial would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (noting that the "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]"); *Uphaus (On Remand)*, 278 Mich App at 185. Defendant was not denied the effective assistance of counsel.

Additionally, we deny defendant's request to remand for a *Ginther* hearing. This Court has already denied defendant's motion to remand, *People v Reiner*, unpublished order of the Court of Appeals, entered June 6, 2013 (Docket No. 313854), and his motion for reconsideration, *People v Reiner*, unpublished order of the Court of Appeals, entered July 30, 2013 (Docket No. 313854). Defendant has failed to establish grounds for a remand.

II. IDENTIFICATION PROCEDURES

Next, defendant argues that he was denied a fair trial by the tainted in-court identifications of him by Eisenhardt's neighbors, Allen Pauli and Thomas Kosciolk. He claims that the pretrial identification procedure used by Detective Melissa Stevens—showing Pauli and Kosciolk still photographs from a surveillance video from a Flagstar Bank branch location—was impermissibly suggestive. We review a trial court's decision to admit identification evidence for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). "Clear error exists when the reviewing

court is left with a definite and firm conviction that a mistake was made.” *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013).

A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). To establish that an identification procedure denied him due process, a defendant must show that the procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The relevant inquiry is not whether the identification procedure was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczuk*, 443 Mich 289, 306; 505 NW2d 528 (1993). If a pretrial identification procedure is unduly suggestive, no testimony about the witness’s identification at the procedure is admissible at trial. *Id.* at 303. However, the witness may still give an in-court identification if an independent basis for the identification, untainted by the pretrial identification procedure, is established. *Id.*

There was nothing unduly suggestive about the pretrial identification procedure with regard to Kosciolek. Kosciolek was shown still photographs from the Flagstar Bank surveillance video and asked if the person depicted in them was the person whom he had given a ride the morning of the incident. The use of surveillance photographs is generally not unduly suggestive because “such films provide a memory-refreshing device, showing the man who actually committed the [crime] as opposed to the picture of some possible suspect in the police files.” *Id.* at 309-310 (quotation omitted). The still photographs showed the actual man whom Kosciolek picked up in his neighborhood and dropped off in the bank parking lot. Kosciolek was not shown photographs from police files depicting the likeness of a possible suspect. Accordingly, we are not left with a definite and firm conviction that the trial court made a mistake when it allowed evidence of the pretrial identification procedure and Kosciolek’s subsequent in-court identification of defendant. *McDade*, 301 Mich App at 356.

There was also no error concerning the pretrial identification procedure with regard to Pauli. Pauli did not identify the person in the still photographs as the man he saw walking on Fairchild Road. He told Stevens that, although he recognized the clothing worn by the person, the still photographs were too blurry for him to make an identification of the person in them. The factors that a court should consider in making a determination whether a pretrial identification procedure is unduly suggestive assume that the pretrial identification procedure resulted in an identification. See *Kurylczuk*, 443 Mich at 306. Further, as already stated, an identification procedure is constitutionally defective where it results in a substantial likelihood of misidentification. *Id.* The result of an unduly suggestive identification procedure is the preclusion of evidence regarding the identification at trial. *Id.* at 303. Because Pauli did not make a pretrial identification from the still photographs, there is no error in this case. Indeed, even if the identification procedure was unduly suggestive, because Pauli did not make an identification, there was no improper identification for the trial court to exclude. Accordingly, the trial court’s decision to permit evidence of the pretrial identification procedure and Pauli’s in-court identification of defendant was not clearly erroneous. *McAllister*, 241 Mich App at 472.

III. RIGHT OF CONFRONTATION

Defendant also argues that the trial court violated his right of confrontation when it admitted the statements of Hadrian Lewandowski², the owner of the Gold Shop in February 2011, to Detective David Ernatt, Sergeant Dan Willis, and Detective Gerald Hanna.³ The trial court held that Lewandowski's statements, although testimonial, were not barred by the Confrontation Clause because they would be used to explain why the police acted as they did and how they came to investigate defendant.⁴ We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). However, the determination whether a defendant was denied his right of confrontation presents a question of law that is reviewed de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Out-of-court statements that are not offered for the truth of the matter asserted are not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). For example, an out-of-court statement that is offered to show the effect on the hearer, such as a statement offered to show why police officers acted as they did, is not hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995); *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). The Confrontation Clause, US Const, Am VI, prohibits testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause does not bar out-of-court testimonial statements that are used for purposes other than establishing the truth of the matter asserted. *Crawford*, 541 US at 59 n 9; *Chambers*, 277 Mich App at 10-11.

Here, after Ernatt visited the Gold Shop on February 24, 2011, Lewandowski called him and left a voicemail message. In the message, Lewandowski identified defendant as a person who had been in the Gold Shop the previous day. The admission of this statement by Lewandowski did not violate defendant's right of confrontation. The statement was not offered for the truth of the matter asserted. Rather, it was offered as background evidence to explain

² Lewandowski died before trial.

³ Defendant also argues that the trial court erred in allowing the prosecutor to present evidence of Eisenhardt's statement to Stevens, made in the hospital on March 4, 2011, that the perpetrator wore a long brown coat that covered a smaller coat. However, the trial court did not allow the prosecutor to present evidence of the statement. It held that the statement was inadmissible hearsay and a testimonial statement under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Accordingly, defendant's argument has no basis in the record.

⁴ Plaintiff has not argued, either below or on appeal, that Lewandowski's statements were admissible under any hearsay exception or that the statements were not testimonial.

why Ernatt acted as he did in returning to the Gold Shop on February 25, 2011, to conduct further investigation. *Chambers*, 277 Mich App at 11.

However, the remainder of Lewandowski's statements to Ernatt, as well as his statements to Willis and Hanna on February 25, 2011, were used for the truth of the matter asserted. After being shown a photograph of defendant, Lewandowski told Ernatt that defendant had been in the Gold Shop on the day of the home invasion. He further said that defendant had thrown "some items" on the counter and asked if they were worth anything. In addition, after Ernatt looked in the tin can where Lewandowski kept the scrap and costume jewelry and saw a ring that matched a description given to him as one that was stolen from Eisenhardt, and which was subsequently identified by Eisenhardt's granddaughter as belonging to Eisenhardt, Lewandowski said that it was possible that defendant had brought in the ring. Lewandowski told Willis that defendant, on his last visit to the Gold Shop, which was between 11:00 a.m. and 12:00 p.m., had pawned the ring and a necklace with a magnifying glass. Then, after Hanna followed Lewandowski to his house to retrieve the necklace, Lewandowski told Hanna, when he handed over the necklace, that it was the necklace that defendant had pawned. These statements by Lewandowski, and especially those to Ernatt and Willis that defendant may have or did bring in the ring, implicated defendant in the home invasion. The statements, which show that defendant was in the Gold Shop on the day of the home invasion and that he pawned jewelry, which may have or did include the ring that belonged to Eisenhardt, were strong circumstantial evidence that defendant was the perpetrator of the home invasion. The statements went to the very heart of the prosecutor's case and therefore, were used for the truth of the matter asserted. See *People v Breeding*, 284 Mich App 471, 488; 772 NW2d 810 (2009). Because Lewandowski's statements were offered for the truth of the matter asserted, and because they were testimonial statements and defendant did not have a prior opportunity to cross-examine Lewandowski, the admission of Lewandowski's statements on February 25, 2011, to Ernatt, Willis, and Hanna violated defendant's right of confrontation. *Jackson*, 292 Mich App at 594.

A violation of the Confrontation Clause is subject to harmless error analysis. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). "A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001) (quotation and alternation omitted). "[A] reviewing court must conduct a thorough examination of the record in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *Shepherd*, 472 Mich at 348 (quotation omitted).

The trial court's error in admitting Lewandowski's February 25, 2011, statements to Ernatt, Willis, and Hanna was harmless beyond a reasonable doubt. *Id.* There was evidence other than Lewandowski's statements that connected defendant to the Gold Shop on February 23, 2011, the day of the home invasion. Ernatt testified that he received some transaction documents from Lewandowski.⁵ One of these documents, the February 23, 2011, purchase order, did not

⁵ Defendant makes no argument that the four transaction documents that were admitted into evidence were improperly admitted.

list defendant's name as the customer or contain defendant's thumbprint. However, it did have a signature. As argued by the prosecutor at trial, the signature on the February 23, 2011 purchase order appears to be the same signature that is on the January 31, 2011 and February 14, 2011 records of transaction, both of which listed defendant's name as the customer and contained defendant's thumbprint.⁶ Accordingly, after a comparison of the signatures on the February 23, 2011 purchase order and the two records of transaction, the signature on the purchase order provides a connection between defendant and the Gold Shop on the day of the home invasion. In addition, the evidence showed that defendant was in the area of Eisenhardt's house at the time of the home invasion. Pauli testified that he saw defendant walking north on Fairchild Road at approximately 9:50 a.m. on February 23, 2011. Pauli thought it was unusual for defendant to be walking on Fairchild Road because the area was remote and it was very cold outside. Kosciolek testified that he saw defendant walking east on 22 Mile Road. According to Kosciolek, defendant was sweating terribly and, once in Kosciolek's vehicle, he never took off his hat and gloves and never looked at Kosciolek. Defendant told Kosciolek that he had been visiting a girl in a nearby trailer park, but Stevens never located anybody in the trailer park who knew defendant. Further, there was evidence that on February 25, 2011, defendant stole the car belonging to Charlotte Stewart and drove to New York. After his arrest in New York, when Investigator Brendan Tumulty asked him about the crimes he committed in Michigan, defendant replied that it was "some big shit" and that he would have to deal with the crimes when he got back to Michigan. Based on this evidence, it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the trial court's error in admitting Lewandowski's February 25, 2011 statements to Ernatt, Willis, and Hanna. *Shepherd*, 472 Mich at 348.

IV. OTHER ACTS EVIDENCE

Finally, defendant argues that the trial court erred in admitting evidence of the 2006 home invasion, committed by him, of the house belonging to Chinmay Despande. According to defendant, evidence of the Despande home invasion was not admitted for a proper purpose. We review a trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs where the trial court's decision falls outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Evidence of a defendant's other acts must be admitted for a proper purpose under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose under MRE 404(b) is one other than establishing the defendant's

⁶ A trier of fact may authenticate a signature by comparison with specimens which have been authenticated. MRE 901(b)(3). The authentication requirement "as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). The authentication requirement for defendant's signatures on the two records of transaction was met where defendant was listed as the customer on the records and the records contained his thumbprint.

character to show his propensity to commit the offense. *People v Magyar*, 250 Mich App 408, 414; 648 NW2d 215 (2002). One proper purpose is to show a defendant's common scheme or plan, MRE 404(b)(1), which was a purpose stated by the prosecutor for admission of evidence of the Despande home invasion, and the one accepted by the trial court.

“[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Here, however, the issue was not whether the charged offenses occurred. The issue was whether defendant was the perpetrator of the offenses. Thus, the relevant issue was the identity of the perpetrator. To show identity is a proper purpose for the admission of other acts evidence. MRE 404(b)(1). When other acts evidence is offered to show identification through modus operandi, there must be some “special quality” of the other act to prove the defendant's identity. *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). Indeed, as explained by our Supreme Court in *Sabin (After Remand)*, 463 Mich at 65-66, the necessary degree of similarity to prove identity is greater than that needed to prove a common scheme or plan. “Unlike evidence of uncharged acts used to prove identity, the [common] plan need not be unusual or distinctive.” *Id.* at 66 (quotation and citation omitted). There was no special quality of the Despande home invasion that proved defendant committed the home invasion at issue in this case. *Ho*, 231 Mich App at 186. The similarities of the two home invasions, forced entry and the stealing of jewelry, did not render the other act and the charged offenses highly similar, and nothing about the similarities of the home invasions was unusual or distinctive. *Sabin (After Remand)*, 463 Mich at 65-66. Accordingly, the trial court abused its discretion in admitting evidence of the Despande home invasion. *Crawford*, 458 Mich at 383.⁷

However, the trial court's error was harmless. The erroneous admission of evidence is generally a nonconstitutional issue. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). “[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) (quotation omitted). Here, evidence of the Despande home invasion was not the only evidence the jury heard about an uncharged home invasion committed by defendant. It also heard evidence that on February 25, 2011, defendant committed a home invasion of the Grosse Pointe Farms house belonging to Stewart and her husband.⁸ Where the jury heard evidence that defendant committed a home invasion two days after the charged home invasion, it does not

⁷ In reaching this conclusion, we acknowledge that plaintiff states that evidence of the Despande home invasion was also offered to prove knowledge and intent. But, there was no issue at trial regarding the knowledge and intent of the perpetrator of the home invasion.

⁸ Defendant states that evidence of the Stewart home invasion was “arguably part of the ‘res gestae,’” a concession with which we agree under the circumstances of this case. He makes no argument that evidence of the Stewart home invasion was improperly admitted.

affirmatively appear that the error in admitting evidence of the Despande home invasion was outcome determinative. *Id.* Moreover, as discussed *supra*, there was strong circumstantial evidence of defendant's guilt.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering